



and Simmons entered an Asset Purchase Agreement (“APA”) that provided for the sale and transfer of Peterson Farms’ assets associated with its poultry live production operations to Simmons. With the exception of the inventory of chickens in the care of contract poultry growers in the Illinois River Watershed (“IRW”) on the date of sale, all of the other Peterson Farms assets acquired by Simmons are located outside of the IRW. The practical effect of the APA was to bring about the end of Peterson Farms’ chicken production and processing activities. The contracts between Peterson Farms and the independent poultry growers who grew chickens for Peterson Farms prior to July 16, 2008 were neither assets, nor transferred to Simmons. The matter of whether the former Peterson Farms’ contract growers would enter new contracts with Simmons was a matter of private negotiation between those parties, which was outside the scope of the APA.<sup>1</sup>

With regard to the instant lawsuit, the transaction was not a stock sale, and therefore, the APA did not shift any liabilities from Peterson to Simmons for operations or actions that transpired prior to the closing date. As it relates to the claims of the Second Amended Complaint, it is relevant that as a consequence of its divestiture of its live production assets, Peterson Farms now has no poultry growing relationships or operations in the IRW.

Peterson Farms contends that the information summarized above is all that Plaintiffs are entitled to learn about the highly confidential APA transaction within the scope of permissible discovery outlined in Fed. R. Civ. P. 26(b)(1). Producing any information beyond this limited scope, even if it netted Plaintiffs some marginally relevant information, is strongly outweighed

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<sup>1</sup> It is also important to note that since Peterson Farms was not privy to the negotiations between Simmons and the former Peterson Farms’ contract growers, Peterson Farms does not know which of the growers have entered new contracts with Simmons as opposed to entering contracts with another poultry company. This information is subject to disclosure by supplementation of previous discovery requests propounded by Plaintiffs in this action.

by the prejudice Peterson Farms will suffer if the intimate details of this transaction are publicized in this litigation.

Despite the fact that there is only a limited range of information from this transaction that falls within the scope of Rule 26, Plaintiffs have, nonetheless, served Peterson Farms with RFPs that are grossly overbroad and invasive. Plaintiffs' RFPs seek for Peterson Farms to produce virtually every document containing every detail, business strategy, and internal justification for this closely-held corporation's private sale of assets. As discussed more fully below, Peterson Farms afforded Plaintiffs an opportunity to correct the deficiencies of their RFPs as well as a mechanism to acquire the information relevant to this case, but they refused. Hence, the Court should appraise Plaintiffs' RFPs on their face, and conclude that they are fatally flawed.

## **II. THE MEET AND CONFER PROCESS**

Upon receipt of Plaintiffs' RFPs, counsel for both Peterson Farms and Simmons concluded that the RFPs were highly objectionable and overly broad, and they arranged a discovery conference with Plaintiffs' counsel, Mr. Garren and Mr. Bullock. During that conference, Peterson Farms' and Simmons' counsel explained their clients' positions pertaining to the highly sensitive and confidential nature of the information Plaintiffs sought through their RFPs, and identified the limited range of information that could potentially be discoverable in light of the claims and defenses at issue in this case. The companies' counsel requested that Plaintiffs specifically identify the topics or specific types of information they believed they truly were entitled to in the prosecution of their claims. Plaintiffs' counsel articulated a few specific topics for which they desired disclosure; however, when the companies' counsel asked them to submit their narrowed requests in writing to facilitate a proper response, Plaintiffs' counsel refused. Rather, Plaintiffs' counsel stated that if Peterson Farms and Simmons would supply the

index of the APA package, they would “consider” narrowing their requests. After investigating the matter the companies’ counsel advised Plaintiffs that no such index exists in the APA.

At this point, the companies’ counsel provided Plaintiffs with two options to resolve the dispute: (1) Peterson Farms and Simmons would supply Plaintiffs with a redacted copy of the APA that disclosed the relevant information as described above; or (2) Plaintiffs would need to revise their RFPs and properly craft them to avoid the serious overbreadth of their current form. *See* e-mail correspondence from S. McDaniel to R. Garren and L. Bullock dated October 16, 2008, attached hereto as Ex. “2.” Plaintiffs’ counsel did not respond, which left Peterson Farms with no option other than proceeding with the instant Motion.

### **III. ARGUMENT AND AUTHORITY**

#### **A. General Principles and the Overbreadth of Plaintiffs’ RFPs**

Plaintiffs’ RFPs are overly broad and present Peterson Farms with a high risk of prejudice arising from disclosing highly confidential business financial and strategic information which is, in large measure irrelevant and immaterial to any issue in this case. Plaintiffs are only entitled to information that falls within the scope of discovery set forth in Fed R. Civ. P. 26(b)(1). “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* To be proper, however, the discovery request must “describe with reasonable particularity each item or category” of information sought. Fed. R. Civ. P. 34(b)(1)(A). “[T]he Supreme Court has underscored that ‘the requirements of Rule 26(b)(1) that the material sought in discovery be relevant should be firmly applied, and the district courts should not neglect their power to restrict discovery [to protect] a party or person from an annoyance, embarrassment, [or] oppression....’”

*Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649 (10th Cir. 2008) (quoting *Herbert v. Lando*, 441 U.S. 153, 177 (1979)).

When a party has propounded discovery that is significantly broader than Rule 26's permissible scope, as is the case here, the problem becomes acute when the discovery reaches the highly confidential business information of a closely-held corporation, such as Peterson Farms. As discussed within the context of each discovery request below, this situation calls out for the Court's intervention under Rule 26(c). First, the subject transaction was a sale of assets comprising Peterson Farms' live poultry operations and its affiliated L.P. Gas Company. With regard to the claims and defenses at issue in this case, the transaction did nothing to alter Peterson Farms' and Simmons' respective exposures to liability other than the fact that Peterson Farms is no longer in the live production business.

Second, none of the assets conveyed to Simmons were within the IRW, other than the live inventory of chickens in the care of contract growers at the time of closing. Plaintiffs are well aware of the fact that Peterson Farms did not own or operate any poultry farms or any other type of poultry-related facility in the IRW. Kirk Houtchens, one of Peterson Farms' corporate designees testified in this case as to the location of Peterson Farms' facilities and operations:

- Q Does Peterson currently own and operate any hen houses?  
 A Yes. They would be primary breeder hens.  
 Q Okay. Where are those located?  
 A They would be in Decatur, Arkansas.  
 Q Does Peterson currently own and operate any pullet houses?  
 A Yes.  
 Q Where would those be?  
 A Decatur, Arkansas.  
 Q Does Peterson currently own and operate any broiler houses?  
 A No.  
 Q Okay. Did Peterson at one time own and operate broiler houses?  
 A No.
- Q. Where's your feed mill?

A. Decatur, Arkansas.

Houtchens 7/26/07 Dep.7:15 – 8:5, 31:12-13, attached hereto as Ex. “3”. Likewise, Peterson Farms’ other corporate designee, Ray Wear, addressed the location of additional company facilities in his deposition:

Q So what, if you can do this fairly succinctly, does the Peterson Farms operation consist of? Peterson Farms, Inc.

A They own the -- they're -- they own -- well, Peterson LP Gas Company, and then they have the processing plant and the hatcheries, and then the Decatur General Store.

Q Isn't there a feed mill that's --

A Yes, there is.

Q -- one of these companies owns?

A Yes.

Q Who owns the feed mill?

A Peterson Farms owns the feed mill.

Wear 7/26/07 Dep. 10:4-16, attached hereto as Ex. “4.”

After the APA was closed, Peterson Farms continued to own some primary breeding and research and development facilities in Decatur, Arkansas as well as the Decatur General Store, all of which lie within the Eucha/Spavinaw Watershed. With respect to the location of the facilities not discussed above that were conveyed to Simmons, Peterson Farms represents that all of those are also outside the boundaries of the IRW. Specifically, the corporate offices, truck shop, processing plant and the hatcheries are located in Decatur, AR, and Peterson LP Gas is located in Jay, Oklahoma, also outside of the IRW. To be sure, since the beginning of this lawsuit, Peterson Farms has always affirmed that it has no operations within the boundaries of the Illinois River Watershed. Peterson Farms only historical relationship to the IRW has been through its contracts with independent poultry growers, of which Peterson Farms now has none.

Had Plaintiffs properly tailored their RFPs to obtain the aforementioned information, this Motion would not have been necessary. Unfortunately, each of Plaintiffs’ RFPs require a much

broad, in fact global production of information and documents pertaining to the strategies and details of this transaction, which if disclosed in this proceeding, will expose Peterson Farms' internal business strategies and irrelevant financial affairs to the public and other members of the poultry industry. It is just this type of "embarrassment and oppression," *i.e.*, prejudice, that Rule 26(c)(1) was designed to prevent.

A recent decision found that the same type of information sought in Plaintiffs' RFPs was irrelevant and outside the scope of permissible discovery. In *In re REMEC, Inc., Securities Litigation*, 2008 WL 2282647 \*2 (S.D. Cal. 2008), the plaintiff alleged that the defendant violated the Exchange Act by "concealing the true business and financial condition of REMEC" from investors. During the course of discovery, the plaintiff issued subpoenas to two third parties; Chelton and Powerwave, each of which had previously purchased a division of REMEC's business. *Id.* at \*1. Specifically, the *REMEC* plaintiff requested:

Request No. 1 seeks: 'All documents concerning any communication regarding any potential or actual merger, purchase or sale of any assets, or other corporate transactions between [Chelton or Powerwave] and REMEC.' Request No. 2 seeks: 'All documents concerning all agreements relating to any potential or actual merger, purchase or sale of any assets, or other corporate transaction between [Chelton or Powerwave] and REMEC.' Request No. 5 seeks 'All documents concerning [Chelton's or Powerwave's] purchase or acquisition of REMEC or any assets thereof [ ].' Request No. 7 seeks 'All documents concerning any due diligence conducted on REMEC.' Request No. 8 seeks 'All documents concerning the valuation of REMEC or any of its assets, in whole or in part, including all analyses, presentations, reports, studies, and comparisons.'

*Id.* at \*3. In response, the defendant filed a motion for protective order with respect to the third party subpoenas on the basis that the information sought by the plaintiff was "irrelevant to the claims and defenses alleged in the case." *Id.* at \*1. The court agreed with the defendant and held that "[t]hese requests also far exceed the scope of the claims and defenses asserted in this case," and in turn, granted the requested protective order. *Id.*

The discovery disallowed in *REMEC* informs the analysis of the RFPs propounded by Plaintiffs here. It is important to note that the *REMEC* court disallowed the plaintiff's discovery in an action that dealt specifically with whether the defendant's business operations and decisions complied with various securities laws. In *REMC*, the plaintiff could at least make a colorable argument that the defendant's confidential business information involving transactions with others may be relevant to such an inquiry. In stark contrast here, Plaintiffs' RFPs are so overly broad on their face, that it is clear that they will reach documents and information that are simply immaterial to this environmental action. There is no plausible circumstance under which Plaintiffs can articulate how information beyond the basics discussed in Section I above is either relevant or could conceivably lead to the discovery of admissible evidence in this action. As a result the Plaintiffs' RFPs exceed the permissible bounds of Rule 26, which justifies the Court sustaining the instant Motion.

**B. Request No. 1**

**Request for Production No. 1:** Please produce copies of the transaction documents (including any indemnification agreements) pertaining to Simmons Foods, Inc.'s acquisition of your poultry operations that was announced on or about June 3, 2008.

As detailed above, this request is grossly over broad in that it seeks for Peterson Farms to disclose the entire documentation of the APA without regard to the volume of highly confidential business information that would be disclosed along with the limited information that is arguably material to the issues in the case. During the discovery conference between the parties, when pressed on this issue, Plaintiffs' counsel could not offer a sound basis for the disclosure of the entirety of these documents beyond the basic structure of the transaction to the extent it has some affect on current operations in the IRW. Plaintiffs' counsel candidly admitted in the conference that they chose not to tailor



their requests to the topics they were interested in because they were not sure what they were looking for. This approach to discovery eschews Plaintiffs' obligation to craft their requests to comply with Rule 26's standards. "The district court, however, is not 'required to permit plaintiff to engage in a 'fishing expedition' in the hope of supporting his claim.'" *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *McGee v. Hayes*, 43 Fed.Appx. 214, 217 (10th Cir. 2002)).

Peterson Farms and Simmons offered Plaintiffs two reasonable alternatives to Court intervention. Plaintiffs could: (1) accept a redacted copy of the APA that disclosed that (i) the transaction was an asset sale that did not transfer any potential liabilities arising in this case from Peterson Farms to Simmons, (ii) the summary list of assets transferred to demonstrate that none of them are in the IRW, and (iii) poultry growing contracts were not transferred, but rather, the decision for each grower to enter a contract with Simmons was an individual matter for decision between the parties to the potential contract; or (2) Plaintiffs would need to revise their RFPs and properly craft them to avoid the serious overbreadth of their current form. *See* Ex. "2." Plaintiffs have not accepted either alternative, which requires the Court to assess the overbreadth of their requests on their face.

### **C. Request No. 2**

**Request for Production No. 2:** Please produce copies of any documents referring or relating to any environmental due diligence activities, reports, disclosures or investigations pertaining to Simmons Foods, Inc.'s acquisition of your poultry operations that was announced on or about June 3, 2008.

This request is improper as it seeks information related to any environmental due diligence performed on facilities, none of which are located within the IRW. Plaintiffs

simply cannot articulate any theory under which facilities that are located such that they cannot have any effect on the environment in the IRW are relevant to or will lead to the discovery of evidence admissible in this proceeding.

#### **D. Request No. 3**

**Request for Production No. 3:** Please produce copies of any documents referring or relating to reason(s) why you decided to transfer your poultry operations to Simmons Foods, Inc.

This request typifies the impropriety of Plaintiffs' RFPs. This request strikes at the very heart of Peterson Farms' most highly confidential business strategies and affairs. Plaintiffs cannot state any basis for the proposition that the reasons Peterson Farms elected to sell its live production assets is relevant to any claim or defense in this case. Peterson Farms has not affirmatively acted to place this matter at issue in these proceedings. It has never claimed that this lawsuit or any of its potential outcomes were a factor in its decision to sell its live production assets.<sup>2</sup> Fed. R. Civ. P. 26(c)(1)(G) specifically allows relief in a situation such as this by providing: "A party or any person from whom discovery is sought may move for a protective order...requiring that...confidential research, development, or commercial information not be revealed...." The Supreme Court described the tension that is created between our liberal discovery code and threat of discovery of abuse in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984). Specifically, the Supreme Court provided:

Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is

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<sup>2</sup> Plaintiffs may well claim to the contrary, but to no effect. Granted, Peterson Farms' counsel has argued before this Court, most recently in the proceedings on Plaintiffs' Motion for Preliminary Injunction that small family companies like Peterson Farms may well not be able to survive if Plaintiffs succeed in imposing the remedies they seek, this falls far short of asserting that the pendency of the lawsuit was driving Peterson Farms out of business.

not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. ... There is an opportunity, therefore, for litigants to obtain-incidentally or purposefully-information that not only is irrelevant but if publicly released could be damaging to reputation and privacy.

*Id.*

Plaintiffs' RFPs place Peterson Farms squarely within the situation described by the Supreme Court in *Seattle Times*. Plaintiffs have requested that Peterson Farms disclose some of the most strongly protected and highly confidential information that any closely-held, private business can ever have. Plaintiffs make this request even though the information sought is totally irrelevant to any issue within this case, which is tantamount to abuse.

The court in *Hope for Families & Community Service, Inc. v. Warren*, 250 F.R.D. 653 (M.D. Ala. 2008) also reviewed a discovery request that sought the disclosure of highly confidential information. The court prefaced its discussion of the discovery motion by first providing, "[r]ule 26(b)(1) is highly flexible, having been designed to accommodate all relevant interests that arise. In particular, considerations of the public interest, the need for confidentiality, and privacy interests are relevant factors to be balanced." *Id.* at 655. (internal quotations omitted). One of the discovery requests specifically at issue sought "all of VictoryLand's financial information from 2003 to present." *Id.* Before ruling on the request, the court found it necessary to mention that "VictoryLand is a closely-held corporation..." *Id.* The court then held, "that while the revenue and profit information only marginally supports the plaintiff's claims, its slight evidentiary utility is far outweighed by the intrusiveness and potential injury of the release of the information about the operation of a closely-held corporation. The motions to compel will be denied." *Id.*

Like the request described in *Hope for Families*, the Plaintiffs seek confidential information from a closely-held business. Unlike *Hope for Families*, however, the information

sought by Request No. 3 provides absolutely no support for Plaintiffs' claims, nor is it in any way related to any other claim or defense in this case. There can be no doubt, however, that even if Peterson Farms' rationale for entering the APA were marginally material to this case, its probative value is far outweighed by the intrusiveness and potential injury that the release of the information poses to Peterson Farms, and therefore, this discovery should be denied.

#### **E. Request No. 4**

**Request for Production No. 4:** Please produce copies of any documents referring or relating to this lawsuit or the subject matter of this lawsuit that were exchanged between you and/or and [sic] Simmons Foods, Inc. (including any persons or firms acting or purporting to act on its behalf) in connection with Simmons Foods, Inc.'s acquisition of your poultry operations that was announced on or about June 3, 2008.

Request No. 4 is a blatant and improper attempt to intrude upon communications between two Defendants, who share a common interest in this litigation, and who are parties to a joint defense agreement. This is not a situation where the purchaser of Peterson Farms' assets was a stranger to this litigation, in which case, Plaintiffs could at least make a colorable argument for the disclosure of the prospective contracting parties' communications pertaining to this lawsuit. On the contrary, as the Plaintiff and the Court are aware, both Peterson Farms and Simmons are parties to a joint defense agreement, which the Court has inspected *in camera* pursuant to a prior discovery dispute. As such, the information requested by Plaintiffs' Request No. 4 is specifically protected from disclosure.

The joint defense privilege is established once the party seeking protection demonstrates: "(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort." *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1043 (10<sup>th</sup> Cir. 1998) (citing *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1<sup>st</sup> Cir. 1980); *United States v. Evans*, 113 F.3d 1457, 1467 (7<sup>th</sup> Cir. 1997) (quoting

*United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989)). “[I]n order for the attorney-client privilege to be expanded by the joint defense/common interest rule, [the party asserting privilege] must show an agreement among all members of the [group] to share information as a result of a common legal interest relating to ongoing or contemplated litigation.” *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D. N.C. 2003). Defendants have previously established that these pre-conditions have been satisfied in this case for the application of this doctrine to the communications between them related to this action.

These principles are not altered as a consequence of the transaction or the APA. Peterson Farms has not shared any documents or communications about this lawsuit in the course of this transaction with anyone other than its co-Defendant, Simmons. There is no distinction that one can draw between these communications and the balance of the joint defense communications these Defendants have shared throughout the course of this matter as they all “refer or relate to this lawsuit or the subject matter of this lawsuit,” which brings them squarely within the joint defense/common interest doctrine. Consequently, any documents responsive to Request No. 4 are protected from discovery.

#### IV. CONCLUSION

Plaintiffs’ *September 18, 2008 Set of Requests for Production to Peterson Farms, Inc.* are overly broad; include within their scope highly confidential information and privileged communications; and are therefore outside the permissible bounds of discovery. The disclosure of this information poses an undue risk of serious injury to Peterson Farms. Therefore, Peterson Farms respectfully requests that the Court deny Plaintiffs this discovery and enter an appropriate Protective Order pursuant to Fed. R. Civ. P. 26(c), together with any other relief the Court deems just and appropriate.

Respectfully submitted,

By /s/ A. Scott McDaniel

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I certify that on the 20<sup>th</sup> day of October, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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